Supreme Court U.S.
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(3)
No. 01-802

In The

Supreme Court of the United States

CAROL R. FISCHER, DIRECTOR OF REVENUE OF MISSOURI,

Petitioner,

v.

MARY E. LEWIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

SCHWARTZ, HERMAN & DAVIDSON
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bsp

QUESTIONS PRESENTED

1. Whether the First Amendment permits Missouri to deny a personalized license plate because the viewpoint of its message is thought to be inflammatory or contrary to public policy.

2. Whether the First Amendment permits Missouri to deny a personalized license plate because the viewpoint of its message is thought likely to provoke hostile reactions by viewers.

3. Whether Missouri's personalized license plate statute that delegates standardless discretion to determine acceptability of license plate messages on the basis of viewpoint is facially valid under the First Amendment.

TABLE OF CONTENTS

Statement of the Case.....1
Reasons why the Writ should not be granted.....3
Reason 1.....4
Reason 2.....5
Reason 3.....7
Conclusion.....8

TABLE OF AUTHORITIES

CASES

Bachellar v. Maryland, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970).....4
Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).....4
Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).....6
Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719 (1966).....4
Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).....4
Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).....4
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).....4
City of Lakewood v. Plain Dealer Pub. Co. 486 U.S. 750, 108 S.Ct. 2138, (U.S.Ohio, 1988).....6
Colorado Republican Federal Campaign Committee v. Federal Election Com'n, 518 U.S. 604, 116 S.Ct. 2309 (U.S.Colo. 1996).....5
Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).....6
Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395 (U.S.Ga.,1992).....7
Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).....5, 7
FCC v. Pacifica Foundation, 438 U.S 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978).....4
Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).....7
Grayned v. Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....4
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S.Ct., at 881-882.....4, 7
Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951).....6

Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32 (1999).....5
Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).....6
Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).....7
National Endowment for the Arts v. Finley 524 U.S. 569, 118 S.Ct. 2168 (U.S. Cal.,1998).....5
Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).....4
R.A.V. v. City of St. Paul, Minn, 505 U.S. 377, 393, 112 S.Ct. 2538, 2549 (U.S.Minn. 1992).....7
Renne v. Geary, et.al, 501 U.S. 312, 111 S.Ct. 2331 (1990).....5
Schneider v. State (Town of Irvington), 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).....7
Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).....6
Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).....4
Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).....7
Texas v. Johnson, 491 U.S. 397, 415, 109 S.Ct. 2533, 2545 (U.S.Tex. 1989).....4
U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, (U.S.Mass. 1968).....4
United States v. Playboy Entertainment group, Inc., 529 U.S. 803, 816 (2000).....2
Young v. American Mini Theatres, Inc. 427 U.S. 50, 96 S.Ct. 2440, (U.S.Mich. 1976).....4, 6

STATUTES

§301.144.3 R.S.Mo. Supp. 1997.....1

STATEMENT OF THE CASE

Missouri's personalized license plate program permits the license plate holder to communicate a message to the public, subject only to the statutory restriction that "no personalized license plate shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or contrary to public policy." §301.144.3 R.S. Mo. Supp. 1997.

Missouri has issued personalized plates with messages denoting religious orientation, (JESUS, ISLAM5, SHALOM), national origin (IRISH, EUROPN, POLLAK, AGREEK), political beliefs (PEACE, PROCCW, PROLYF, PROLIF, PROUSA), and ethnic or cultural heritage (CELTIC, AFROAM, INDIAN, BLKMAN). See Respondent's Appendix B.

Since 1992, Respondent has displayed a personalized license plate reading "ARYAN-1." During 1997, Missouri officials received an anonymous complaint letter from a person who saw Respondent's plate and was offended. In response to the complaint letter, Missouri's Director of Revenue reviewed the plate with members of the Motor Vehicle Policy Group. The Director testified that she personally found the message conveyed to be offensive because it represents a "viewpoint" or "philosophy that believes in the annihilation of the Jews, African-Americans and other races that aren't Aryan." Respondent's Appendix A. The Motor Vehicle Policy Group agreed with her that the general public would also find the message offensive.

On June 17, 1997, Missouri notified Respondent that it would not renew her license plate because it "conveyed a message that is contrary to public policy." District Court opinion, Respondent's Appendix, A-7. Missouri shifted the focus of its public policy objections to Respondent's plate several times during the litigation. At first, Missouri justified its decision on the grounds that the plate's message was offensive. Later the

focus shifted to a concern for public safety in the prevention of "road rage." A-22. Missouri did not rely on the "obscene, profane or inflammatory" exclusions of the statute.

The District Court invalidated Missouri's action under the "against public policy" prong of the statute, holding that such provision is "an unreasonably vague regulation of a nonpublic forum, which in effect creates standardless discretion in a public official." Petitioner's Appendix. A-13. However, the District Court dismissed Respondent's complaint, holding that Respondent failed to challenge the remaining statutory prongs that were severable, and in the words of the District Court, "the Director might still have constitutionally permissible grounds for denying or revoking [Respondent's] vanity plate." Petitioner's Appendix. A-15.

The Eighth Circuit affirmed the District Court's ruling that the "against public policy" prong of the statute was constitutionally void. The court expressed "some initial skepticism" as to Missouri's characterization of the license plate as a nonpublic forum, but ultimately found it unnecessary to resolve the issue of the precise nature of the forum holding Missouri's statute unconstitutional, whatever kind of forum it might be. A-20.

The Eighth Circuit also reversed the District Court's dismissal of Respondent's complaint, holding that Missouri failed to meet its burden to prove the constitutionality of its interference with speech, and that Respondent was not required to prove the absence of a constitutional basis for Missouri's actions, citing *United States v. Playboy Entertainment group, Inc.*, 529 U.S. 803, 816 (2000). The court further held that even if Missouri had advanced the "inflammatory" prong of the statute, it suffered from the same constitutional defect as the "against public policy" criteria. Petitioner's Appendix. A-25

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. MISSOURI'S STATUTE IS UNCONSTITUTIONAL AS APPLIED AND IT IS UNNECESSARY TO REACH THE QUESTION OF STATUTORY OVERBREADTH, THEREFORE THIS CASE IS NOT AN APPROPRIATE VEHICLE IN WHICH TO DECIDE THE CONTINUING VALIDITY OF THE OVERBREADTH DOCTRINE.

2. NEITHER OF THE ALLEGEDLY CONFLICTING DECISIONS CITED BY PETITIONER INVOKE THE OVERBREADTH DOCTRINE IN THE CONTEXT OF A PRIOR RESTRAINT SPEECH LICENSING REGULATORY SCHEME, AND ARE THUS DISTINUISHABLE AS A MATTER OF BOTH FACT AND LAW.

3. THE EIGHTH CIRCUIT'S REJECTION OF A HECKLER'S VETO FOLLOWS A LONG UNBROKEN LINE OF AUTHORITY WHICH THE EIGHTH CIRCUIT FULLY CONSIDERED AND CORRECTLY APPLIED.

1. MISSOURI'S STATUTE IS UNCONSTITUTIONAL AS APPLIED AND IT IS UNNECESSARY TO REACH THE QUESTION OF STATUTORY OVERBREADTH, THEREFORE THIS CASE IS NOT AN APPROPRIATE VEHICLE IN WHICH TO DECIDE THE CONTINUING VALIDITY OF THE OVERBREADTH DOCTRINE

Missouri admits it rejected Respondent's personalized license plate because the viewpoint of the message expressed therein was offensive. Such admission conclusively demonstrates that Missouri's statute is unconstitutional as applied. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 415, 109 S.Ct. 2533, 2545 (U.S.Tex. 1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S., at 55-56, 108 S.Ct., at 881-882; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72, 103 S.Ct. 2875, 2879, 2883, 77 L.Ed.2d 469 (1983); *Carey v. Brown*, 447 U.S. 455, 462-463, 100 S.Ct. 2286, 2291, 65 L.Ed.2d 263 (1980); *FCC v. Pacifica Foundation*, 438 U.S., at 745-746, 98 S.Ct., at 3038; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68, 96 S.Ct. 2440, 2448-2450, 2450-2451, 49 L.Ed.2d 310 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 16-17, 96 S.Ct. 612, 633-634, 46 L.Ed.2d 659 (1976); *Grayned v. Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302-2303, 33 L.Ed.2d 222 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567, 90 S.Ct. 1312, 1314, 25 L.Ed.2d 570 (1970); *U.S. v. O'Brien*, 391 U.S. 367, 382, 88 S.Ct. 1673, 1681 (U.S.Mass. 1968); *Brown v. Louisiana*, 383 U.S., at 142-143, 86 S.Ct., at 724-725; *Stromberg v. California*, 283 U.S., at 368-369, 51 S.Ct., at 535-536. Whether license plates constitute a public or nonpublic forum is irrelevant because viewpoint discrimination is impermissible in all forums, even

nonpublic ones. *National Endowment for the Arts v. Finley* 524 U.S. 569, 615, 118 S.Ct. 2168, 2192 (U.S. Cal.,1998); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985).

The lower court's decision could have and should have limited their holding to Missouri's unconstitutional application of its statute in the narrow facts of this case. The lower courts' further inquiry into the statute's facial invalidity was and is dicta, unnecessary to the final decision and result in this case. Since the lower courts' analysis of the facial constitutionality of the statute was merely advisory, this case is not an appropriate vehicle for Missouri's challenge to the overbreadth doctrine. A facial challenge generally should not be considered when an "as applied" challenge fully resolves the case. *Colorado Republican Federal Campaign Committee v. Federal Election Com'n*, 518 U.S. 604,624, 116 S.Ct. 2309, 2320 (U.S.Colo. 1996); *Renne v. Geary*, et.al, 501 U.S. 312, 324, 111 S.Ct. 2331, 2340 (1990).

2. NEITHER OF THE ALLEGEDLY CONFLICTING DECISIONS CITED BY PETITIONER INVOKE THE OVERBREADTH DOCTRINE IN THE CONTEXT OF A PRIOR RESTRAINT SPEECH LICENSING REGULATORY SCHEME, AND ARE THUS DISTINUISHABLE AS A MATTER OF BOTH FACT AND LAW.

Neither *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) (United Reporting) nor *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (Finley), present any conflict with the instant decision. United Reporting involved a facial challenge to a state statute regulating private access to government records and did not abridge any third party's right to engage in speech. Finley was a case concerning government funding of arts organizations, holding that the challenged statutory criteria were merely advisory, and did not interfere with the rights of private

speakers in a public forum. Neither case involved the prior restraint licensing of third party speech.

The instant case is legally and factually distinguishable because it concerns Missouri's exercise of standardless and therefore virtually unlimited discretion to prohibit and punish politically unacceptable speech within a statutory scheme that expressly purports to license acceptable speech.

The most common, and never challenged use of the overbreadth doctrine is within the context of third party speech licensing regulatory schemes, as presented by the instant case, where speech has required prior official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. *City of Lakewood v. Plain Dealer Pub. Co.* 486 U.S. 750, 757, 108 S.Ct. 2138, 2144 (U.S.Ohio, 1988); *Young v. American Mini Theatres*, Inc. 427 U.S. 50, 60, 96 S.Ct. 2440, 2447 (U.S.Mich.,1976); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Cox v. Louisiana*, 379 U.S. 536, 553-558, 85 S.Ct. 453, 463-466, 13 L.Ed.2d 471 (1965); *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *Broadrick v. Oklahoma*, 413 U.S. 601. Petitioners can cite no case in which this court, or any other court, has challenged the continued application of the overbreadth doctrine to invalidate such prior restraints of speech by discretionary governmental licensing.

To the extent that the overbreadth doctrine was invoked by the courts below, it was applied in the narrow context for which it was originally created, and in a manner consistent with all prior precedent. It did not establish a "new rule" as Petitioners complain. Nor is there justification for Petitioners' warning of apocalypse to the integrity of other states' insurance codes, employment policies, or prison regulations, which do not relate to prior restraint attempts by the state to regulate speech.

3. THE EIGHTH CIRCUIT'S REJECTION OF A HECKLER'S VETO FOLLOWS A LONG UNBROKEN LINE OF AUTHORITY WHICH THE EIGHTH CIRCUIT FULLY CONSIDERED AND CORRECTLY APPLIED.

This Court's rejection of the heckler's veto has never wavered. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-135, 112 S.Ct. 2395, 2403-404 (U.S.Ga.,1992); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56, 108 S.Ct. 876, 881-882, 99 L.Ed.2d 41 (1988); *Murdock v. Pennsylvania*, 319 U.S. 105, 116, 63 S.Ct. 870, 876, 87 L.Ed. 1292 (1943); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939); *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Petitioners' suggestion that this Court's precedents allow anticipated public reaction to an offensive viewpoint to be used within a statutory scheme of prior restraint, is simply wrong. Petitioners' citation of *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S.788, 811, 105 S.Ct. 3439, 3454 (U.S.Dist.Col. 1985), for the premise that the First Amendment does not prohibit a viewpoint-neutral exclusion in a nonpublic forum is irrelevant to the instant case wherein Petitioners' actions were admitedly viewpoint-motivated.

Petitioner's attempt to avoid the heckler's veto doctrine, contending their regulations are directed solely at the secondary effects of speech. The Eighth Circuit's rejection of Petitioners' contention is consistent with this Court's ruling in *R.A.V. v. City of St. Paul, Minn*, 505 U.S. 377, 393, 112 S.Ct. 2538, 2549 (U.S.Minn. 1992).

Petitioners fail to identify any conflict with any Court ruling, and their petition for certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Petitioner's Petition for Certiorari should be denied.

Respectfully Submitted,

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RESPONDENT'S APPENDIX A – EXTRACT OF DEPOSITION OF JANETTE LOHMAN MAY 24, 1999 PAGES 31-32

(MR. HERMAN CONTINUING) Is there a reason - - is it the belief by the Department of Revenue and its agents that the proposed license plate that reads A-R-Y-A-N-1 represents an offensive philosophy? Is that the reason that the plate was denied?

A. (LOHMAN) The reason that the plate was denied was because we thought it was going to - - we had already had a complaint about it and it already had offended somebody and we thought it was the kind of plate that could offend the general segment of the community. And based on public policy concerns in terms of public safety the fear is that if you have a license plate that is going - - that could in fact provoke road rage you're going to be endangering the person who has the plate as well as other people who might be hurt if an accident occurred.

Q. Well, it's not obscene in the sense of scatological, correct?

A. What does that mean?

Q. Scatological means four letters (sic) words, the common four letter words or bathroom humor or - - I believe you have a list somewhere of words that are prohibited and I think that's that list over there with reference to body parts.

A. It certainly doesn't reference to body parts.

Q. And the reference that makes it offensive is a reference to philosophy, right?

MR. SWITZER: I'll object to the question, it's been asked and answered.

(MR. HERMAN CONTINUING) I'm just trying to narrow it down so I understand. Is it the reference to an objectionable philosophy the thing that makes this plate violate public policy in your view?

A. The thing that makes it violate public policy in my view is the fact that it does refer, as you suggest, to a

philosophy that believes in the annihilation of the Jews, African-Americans and other races that aren't Aryan.

APPENDIX B – SELECTED LICENSE PLATES DATED FEBRUARY 16, 1999 PRODUCED BY THE MISSOURI DIRECTOR OF REVENUE IN RESPONSE TO RESPONDENT'S MOTION FOR PRODUCTION OF DOCUMENTS AND APPEARING IN RESPONDENT'S INDEX, EIGHTH CIRCUIT BRIEF, EXHIBIT 7

MISSOURI DEPARTMENT OF REVENUE
INFORMATIONS SYSTEM DIVISION
SPECIAL TYPE PLATE FILE SEARCH
ALL PERSONALIZED PLATES IN TABLE FORMAT
(SELECT PLATE TYPES /EXP –YEARS GE 1999)

AFROAM
AGREEK
BLKMAN
CELTIC
EUROPN
JESUS
INDIAN
IRISH
ISLAM5
PEACE
POLLAK
PROCCW
PROLYF
PROLIF
SHALOM